Fair Up or Down Vote

May 19, 2005

Noteworthy

"The Senate has the unquestioned power to define its procedures (through rules, precedents, etc.) by majority vote. The power comes straight from the constitution. I know because I've seen it done. More importantly, I've seen the Senate repeatedly accept the legitimacy of changing the rules by majority vote." **Senator Stevens**, Press Conference, 5/19/05
Prepared Remarks of Senator Stevens

"These filibusters use Senate rules to prevent ending debate, prevent taking a vote, and prevent confirmation. That is not only baffling, it is unprecedented**." Senator Hatch,** Senate Floor, 5/19/05
Full Transcript of Senator Hatch

"So we have a wonderful human being who has been demonized for four years and she has shown judicial temperament in every way by never responding, by showing no bitterness, no anger, but she is a human being and she is a good person. She deserves an up-or-down vote." **Senator Hutchison,** Senate Floor, 5/19/05
Full Transcript of Senator Hutchison

Justice Janice Brown Out of the Mainstream?

- In 1998, the last time Janice Rogers Brown was on the California ballot, Brown received 79 percent of the vote in San Francisco County
- In 2004, John Kerry received 83 percent in San Francisco County

Statement of Sen. Orrin G. Hatch
before the
United States Senate
May 19, 2005

SEN. HATCH. Mr. President, last week, when the Judiciary Committee considered the asbestos bill, one of our Democratic colleagues referred to proposed amendments to that bill and said something very important: *Let's debate them and vote them up or down.*

He said it the way the American people believe it, that debating and voting is what legislators do.

Let us debate them, and vote them up or down.

The Senator offering that idea was my colleague from Vermont, Senator Leahy. He was speaking then about legislation, but he and other Democrats once insisted that the Senate should follow the same principle as we evaluate the President's judicial nominations.

In October 1997, for example, he said here on the Senate floor: "I hope we might reach a point where we as a Senate will *accept our responsibility and vote people up or vote them down*. Bring the names here. If we want to vote against them, vote against them."

It is always refreshing to see our fellow citizens, from all over this great country, coming here to sit up in the gallery and observe *their* United States Senate at work.

Some of them with us today might actually be asking, why is the Senator from Utah making such a big deal about something that seems so obvious?

Mr. President, many of our fellow citizens might be surprised to learn that the Senators they elect and send to Washington are refusing to vote on judicial nominations.

They might share the sentiment of former Democratic Leader Senator Tom Daschle, when he said in 1999: "I find it simply baffling that a Senator would vote against even voting on a judicial nomination."

Those Senators are blocking votes because they know they will lose those votes. If we debate these nominees, America will better understand why we need judges who will interpret, not make, the law.

America will see how these highly qualified judicial nominees meet that standard.

And America will see that these nominees have bipartisan majority support.

The political forces promoting an activist, politicized judiciary naturally oppose many of these nominees, and their strategy is simple.

The Senate cannot confirm nominees if Senators cannot vote on them.

We cannot vote if we cannot end debate.

These filibusters use Senate rules to prevent ending debate, prevent taking a vote, and prevent confirmation.

That is not only baffling, it is unprecedented.

This is not a tangent, an academic issue, or a question that will one day be found in the game *Trivial Pursuit: Senate Edition*. This issue is central to this debate, and our Democratic colleagues know it. Some are so desperate to claim even one, single, solitary precedent for what they are doing that they stretch, twist, and morph the word *filibuster* beyond all recognition.

They want the word *filibuster* to mean so many things, that it ultimately means virtually nothing at all.

Unfortunately, Mr. President, these mischaracterizations of Senate history, tradition, and rules cynically exploit the fact that many of our fellow citizens have not mastered the particulars of Senate history, the peculiarities of Senate procedure, or the idiosyncrasies of the confirmation process. Misleading, confusing, and patently false claims can easily take on a life of their own, echoed and repeated through the media, cybserspace, and here on the Senate floor.

We all know that it can take a long time for what is true to catch up with what is false.

Judicial filibuster defenders have claimed that when the Senate voted to end debate on past judicial nominations, we were actually filibustering those nominations.

They want Americans to believe that ending debate *then* justifies refusing to end debate *now*.

Or they claimed that when the Senate voted to confirm judicial nominations in the past, we were actually filibustering those nominations.

They want Americans to believe that confirming nominations *then* justifies refusing to confirm them *now*.

Those bizarre claims focus on what happens here on the Senate floor, at the end of the judicial confirmation process. Sometimes, judicial filibuster defenders have focused instead on what happens in the Judiciary Committee, an earlier phase in the process. Some appear willing to try anything to create a precedent for their filibusters.

Some even claim that any nomination which is not ultimately confirmed, no matter what the reason, no matter what the step in the process, has been *filibustered*.

Giving a word any meaning you want may help make any argument you want to make, but it does not make that argument legitimate.

This gimmick may have some public relations punch. It leads to clichés such as *pocket veto* or *one-man filibuster* and creates villains like, well, like me. What kind of campaign would this be without a bogeyman? After all, I was Chairman of the Judiciary Committee for six years under President Clinton.

Never mind that the Republican Senate confirmed 377 judges for President Clinton, just five short of the all-time confirmation record set by President Reagan.

Never mind that President Reagan had his own party controlling the Senate for six years, while President Clinton had the other party the controlling the Senate for six years.

Never mind facts like that. The Assistant Minority Leader yesterday claimed that every Clinton nomination that was not ultimately confirmed was *filibustered*, and that I personally *buried* them. My hand alone held back a confirmation wave of apparently mythic proportions.

Look for a moment at what it takes to believe that every unconfirmed nominee is a filibustered nominee.

It requires believing that the dozen nominees President Clinton himself withdrew were filibustered.

President Clinton, for example, withdrew one appeals court nominee fewer than six months after her nomination because of health concerns. Her nomination did not get out of the Judiciary Committee, did not receive a floor vote, and was not confirmed. But was she filibustered? Is her situation the same as Justice Priscilla Owen, who has been waiting for more than four years and cannot get a floor vote because of a filibuster?

This line that all unconfirmed nominees are filibustered nominees requires you to believe ill-founded arguments like that.

It also requires believing that the 28 nominations sent too late to be considered, or which President Clinton chose not to re-submit, were filibustered.

It requires believing that nominations not given hearings because of opposition by their home-state Senators were filibustered. The Judiciary Committee system that gives extra weight to the views of Senators from the nominee's home state has been in place, in various forms, for nearly a century. Democrats as well as Republicans use it. I do not hear the Democrats who now want to call those situations filibusters also calling to abolish that system of home-state senatorial courtesy.

They cannot have it both ways.

The Majority Leader, Senator Frist, recently offered a proposal that would not only address our concerns about the floor by ensuring up or down votes, but address Democrats' concerns about the committee by guaranteeing reporting of nominees. Democrats rejected that offer. Either they think treatment of judicial nominees in the Judiciary Committee is a problem needing a remedy or they do not.

They cannot have it both ways.

Democrats know that many factors determining whether a nomination is approved by the Judiciary Committee are not simply up to the Chairman's unilateral discretion.

Democrats know that there are procedures in the Judiciary Committee, and here on the floor, for forcing a committee chairman to act if Senators believe the chairman is dragging his feet and that those procedures were never used.

Democrats know those things, and they also know that many of our fellow citizens do not. So the spin machine cooks up this tale that *all unconfirmed nominees are filibustered nominees*, attempting to make people believe there is some precedent, even a totally fictional precedent, for their current filibusters.

Saying that ending debate is the same as not ending debate did not work.

Saying that confirming nominations is the same as not confirming nominations did not work.

Saying that President Clinton's near-record confirmation total is evidence of unfair treatment by Republicans will not work either.

On Tuesday, the distinguished Senator from Wisconsin, Senator Feingold, was here making a few other arguments. He pointed out that the text of the Constitution does not require an up or down confirmation vote for judicial nominations.

Many of our colleagues on the other side of the aisle attack judicial nominees when *they* take the Constitution's text this seriously, but I am glad the Senator from Wisconsin is doing so.

The word *filibuster* is not found in the Constitution either. Nor are phrases such as *unlimited debate*, *minority rights*, or even *checks and balances*. None of the phrases used by some to try to give these judicial filibusters a constitutional anchor are in the charter's text.

What the Constitution does say, however, is that the President has the power to nominate and appoint judges. Not the Senate, the President.

Our role of advice and consent is a check on the President's power to appoint. When the filibuster turns our check on the President's power into a weapon that highjacks the President's power then, yes, it has indeed violated the design that is most certainly in the text of the Constitution.

The Senator from Wisconsin also said that the procedure the Majority Leader may use to prohibit judicial filibusters will mean changing Senate rules by *fiat*. That is a variation on the Democratic mantra that this would *break the rules to change the rules*. That is a catchy little phrase, but neither of its catchy little parts is true.

The Senate operates not only by its written rules, but also by parliamentary precedents established when the presiding officer rules on questions of procedure asked by Senators.

What we call the *constitutional option* would seek such a ruling from the presiding officer. After sufficient debate, the Senate should vote on a judicial nomination. Senate precedents and procedures would change, but Senate rules would remain untouched. No breaking of the rules, no changing of the rules.

Senators use the word *fiat* because it sounds bad and fits with the *abuse of power* theme probably born in a focus group somewhere. The word attempts to give people a bad impression, but it should give them an even worse impression to know that it is patently false.

The Constitution gives authority over Senate rules and procedures to the Senate – not to the parliamentarian, or to the presiding officer, but to the Senate.

If the presiding officer rules on a question of procedure, it will not actually change Senate procedure until a majority of Senators vote to do so.

Just as American self-government is radically different than monarchy, Senate self-government is radically different than fiat.

The Senator from Wisconsin said that whenever the Senate merely takes a cloture vote, or a vote to end debate, a filibuster is always underway. That too is patently false.

[REFER TO CHART] Mr. President, the Congressional Research Service states it clearly: "it is erroneous to assume that cases in which cloture is sought are always the same as those in which a filibuster occurs." Let me repeat that: "it is erroneous to assume that cases in which cloture is sought are always the same as those in which a filibuster occurs."

Let me use two examples.

Among President Clinton's most controversial nominees were Marsha Berzon and Richard Paez, nominated to the U.S. Court of Appeals for the Ninth Circuit. Our colleague from New York, Senator Schumer, in November 2003 called these nominees "very liberal" and "quite far to the left." That is quite something, coming from a Senator who has never been called even a little to the right.

On November 10, 1999, the Majority Leader at the time, Senator Lott, promised that he would bring these controversial nominations up for a confirmation vote no later than March 15, 2000. He correctly said that I agreed with using a cloture vote to ensure that a confirmation vote occurred.

On March 8, 2000, that is exactly what we did. The first two names on the petition for a cloture vote were Senator Lott and myself. We took that cloture vote to prevent a filibuster and ensure an up or down vote. We prevented a filibuster, that vote occurred, and the Senate confirmed both nominees. They are today sitting federal judges.

The Senator from Vermont, Senator Leahy, said on Tuesday that the constitutional option, which would use a parliamentary ruling to prohibit judicial filibusters, would "use majority power to override the rights of the minority."

I have called this parliamentary approach the *Byrd option* because, when he was Majority Leader, Senator Byrd used it to change Senate procedures. He did so regarding legislation, and also regarding nomination-related filibusters.

In 1980, for example, Majority Leader Byrd wanted to prohibit filibusters of the motion to proceed to nominations. Just as a confirmation vote cannot happen if debate does not end, debate cannot start if the Senate cannot vote to proceed to that debate.

Today, we hear that any limitation on debate, any restriction of the filibuster, strikes at the very heart and essence of this institution. Maybe it was a different story back then. When the presiding officer ruled against what Majority Leader Byrd was trying to do, he appealed that ruling and the Senate voted to overturn it, effectively terminating those nomination-related filibusters.

Let me remind you what my good Democratic friend from West Virginia said when he used the procedure to change the filibuster rule [REFER TO CHART]: "I have seen filibusters. I have helped to break them. There are few Senators in this body who were here [in 1977] when I broke the filibuster on the natural gas bill….I asked Mr. Mondale, the Vice President, to go please sit in the chair; I wanted to make some points of order and create some new precedents that would break these filibusters.

And the filibuster was broken – back, neck, legs, and arms….So I know something about filibusters. I helped to set a great many of the precedents that are in the books here."

On at least three other occasions, Majority Leader Byrd used a ruling by the presiding officer to change Senate procedures without changing the underlying Senate rules.

The Senator from Vermont says that using this very same mechanism today would be an outrageous trashing of minority rights. Yet he voted every time to support Majority Leader Byrd's use of that mechanism, including to eliminate nomination-related filibusters.

Yesterday, the Senator from Illinois, Senator Durbin, claimed that Senate rules, in his words, *from the very beginning*, required an extraordinary majority to end debate.

Now that is factual claim, and it is factually false.

The Senate adopted its first rules in 1789. Rule eight allowed a simple majority to proceed to a vote. The men who founded this Republic designed this Senate without the minority's ability to filibuster anything.

Over the last few days, many excuses have been offered why some refuse to debate and vote on judicial nominations that reach the Senate floor.

Let me correct that. <u>While these may be their *reasons*, there are no valid *excuses*</u>.

When procedural obstructive devices such as the filibuster are kept where they belong, in the legislative process, the debate can properly focus on the merits of these nominees. That is what debating and voting should ultimately be about, the President's nominees.

The debate we have seen here on the Senate floor regarding nominees such as Justices Priscilla Owen and Janice Rogers Brown is typical of what we will see in the future regarding other nominees.

Many of our fellow citizens may know little of the Senate's Byzantine procedures, they may know little about judicial rulings, they may not speak *legalese*, but I hope they will not be afraid to participate in this process.

Let me offer a few pointers, a few tips, for the road ahead.

Politics is often about results, about winners and losers, and involves politicians asserting their will. Law is about the process of reaching results, about what the law requires, and involves judges using judgment.

Politics and law are two very different things, and our liberty depends on preserving that difference. So if you hear critics of judicial nominees talking only in the language of politics, you know something is wrong.

In the last day or two, for example, critics of the nominees before us have reduced them to soundbites, checklists, and litmus tests.

Senators begin sentences with phrases such as *she ruled that……* or *she ruled for…….*

Mentioning only those results, without exploring how a judge reached those results, amounts to applying political criteria to a judicial nominee, and that is fundamentally wrong. Sometimes the law requires results we may not like, results that may even sound dramatic.

Mentioning the political results without the judicial process leading to those results misleads people about what judges do and how to choose the rights ones.

Or the critics will characterize what a judge said rather than tell us what she actually said.

Or if they do quote the judge, critics will often pluck out only a phrase, or use lots of ellipses.

These are signs that spin may be in the air.

Or the critics will quote other critics. Imagine if the only thing someone knew about you came from what your critics or enemies said about you. That picture would be distorted, incomplete, and just plain false.

So our fellow citizens should not be worried that they do not know the language of lawyers, that they have not read a judicial nominee's writings or rulings, or are not well-versed in the fine points of legal argument.

I hope they will listen critically to the debate here in the Senate about these nominees, their qualifications, and their records.

I hope our fellow citizens will be very skeptical of critics who make a *political* case against a *judicial* nominee, skeptical if the case against a nominee is limited to soundbites about results or characterizations by third parties.

Mr. President, let me conclude my remarks by noting that in September 2000, the Senator from Michigan, Senator Levin, said that the Constitution each of us has sworn to protect and defend requires that we debate and vote on judicial nominations reaching the floor.

I agreed with that principle then, and I agree with it today.

For more than two centuries, we kept the filibuster out of the judicial confirmation process.

It is surely not a good sign about our political culture that we must today formalize by parliamentary ruling a standard we once observed by principle and self-restraint.

But that self-restraint has broken down, and maintaining our tradition of up or down votes for judicial nominations is worth defending. Once we take unprecedented obstruction tactics like the filibuster off the table, we can focus where we should, on the merits and qualifications of nominees.

Mr. President, we must have a standard that binds both political parties. That standard must be fair, it must respect the separation of powers, and it must be consistent with our own Senate tradition.

Between 1789 and 2003, we had a strong consistent tradition of voting on judicial nominations once they reach the Senate floor.

We should return to that principle and practice.

Unfortunately, in 2003, the Democratic leadership broke with this longstanding Senate tradition and took an ill-founded turn down a partisan political path and unwisely changed the confirmation process in an unprecedented fashion.

We must turn back from that path. Once a judicial nomination reaches us here, our course should be clear. Let us debate and then let us vote.

I yield the floor.

# # #

Floor Speech of Senator Hutchison
5/19/05

Mrs. Hutchison: Mr. President, I'm pleased that the debate on Priscilla Owen is beginning to give her side of the story. We are finally getting past the sweeping characterizations about her that have been put forward in the news media for years by

interest groups. Though who say, “Oh, she’s outside the mainstream; or she is an extremist.”

But now on the floor of the United States Senate we are getting down to specifics. Every single time that we have been able to examine a specific criticism of a particular opinion by Justice Owen, that criticism has been clearly and decisively refuted.

Justice Owen is a careful and thoughtful jurist. She is an extremely talented intellect. She uses her ability to read every statute and enforce it fairly. She is the very model of a judge who interprets the law and does not: -- does not legislate from the bench.

Let’s get to the heart of the matter. One of the major criticisms of justice Owen is her efforts to interpret a 1999 law passed by the Texas state legislature requiring parental notification before a minor can obtain an abortion. Most of the groups opposing Justice Owen strenuously opposed passage of that law in the first place. But the Texas legislature did approve a parental notification requirement with a strong bipartisan majority favoring it in both the Texas house and Senate. The house was controlled by Democrats at the time, and it required that any minor seeking an abortion notify at least one parent or receive permission from a judge to bypass that step. It was later up to the Supreme Court to interpret that bill. The law did not provide clear direction to the justices on several key points.

We are talking about 13 cases that came to the Supreme Court for review. As sometimes occurs the court was divided in how to interpret the law, particularly the portion allowing a minor to bypass parental notification by going to court. Some justices, a majority, looked to other states on how their courts interpreted their parental notification statutes, even though those states had different laws and different legislative history. Other justices, including Justice Owen, looked first at the intent of the Texas legislature. She then looked to rulings of the U.S. Supreme Court. She reasoned correctly that the legislature had attempted to fashion the law to conform with Supreme Court rulings. Still, other justices, I should add, took a different approach to analyze the bypass provision and in some cases they would have required greater restrictions on use of the judicial bypass than Justice Owen would have imposed.

One of Justice Owen’s colleagues on the Supreme Court at that time was Alberto Gonzales, now the U.S. attorney general. The opposition to Justice Owen rests much of its case on a single phrase in one of then-justice Gonzales’ opinions in which he referred to judicial activism. He later, and under oath, clarified what he was talking about. He said, “My comment about an act of judicial activism was not focused at Judge Owen or Judge Brown. It was actually focused at me.” This is a tragically misleading statement to be used against Justice Owen.

First, judges disagree. That’s why we have a nine-member court. They argue with each other. They accuse each other of misreading the statutes. That is exactly the way it goes in many opinions. And in fact, every member of the Texas Supreme Court was accused by one justice or another of judicial activism during the course of their service on

the court. Attorney general Gonzales has testified under oath that he was not referring to Justice Owen's opinion when he wrote the offending phrase. He said he was referring to himself. That, by itself, should dispose of the matter. Elsewhere in the same opinion, Justice Gonzales wrote another sentence. Curiously, that sentence is never cited by opponents of Justice Owen. Let me quote what Justice Gonzales wrote, "Every member of this court agrees that the duty of a judge is to follow the law as written by the legislature." In other words, he specifically stated that none of the nine justices on the Texas Supreme Court is a judicial activist.

Finally, let me point out that justice Gonzales was white house counsel when president bush nominated Justice Owen for the fifth circuit back in 2001. In other words, General Gonzales was in charge of the process that produced Judge Owen's nomination. Does anyone seriously believe he would select a nominee for this position if he thought she were a judicial activist?

I want to look at the 13 cases from a statistical standpoint. Justice Owen is solidly in the mainstream of her court. In these 13 rulings, Justice Owen was in the majority ten times and found herself in dissent only on three occasions. She disagreed with the majority decision three times. In those 13 cases, the Texas Supreme Court required notification six times and facilitated a judicial bypass seven times. So Justice Owen voted to require parental notification in nine cases and to facilitate the judicial bypass in four. Remember no case on judicial bypass reached the Texas Supreme Court at all unless it had first been denied by two courts and by up to four judges. This is important because under our system, the trial court is charged with ascertaining the facts in a case.

In other words, justice Owen is being faulted for being more willing to defer to trial court findings of fact because she knows that trial judges have the unique ability to assess a witness' demeanor and credibility. Now, was Justice Owen's approach in the mainstream?

Earlier this week the United States Senate was visited by a group of six Texans. They represent diverse views, but they came to Washington to support Justice Owen and ask for fair treatment of her. They included Tom Phillips, who was chief justice of the Texas Supreme Court for most of the time that Justice Owen has served. It included Elizabeth Whitaker, a past president of the state bar of Texas, one of 15 past state bar presidents, Republican and Democrat, who are supporting Justice Owen's nomination.

In the group was Linda Eads, a former assistant state attorney general who is now a professor at the SMU Law School. She specializes in constitutional law. Linda Eads describes herself as strongly pro-choice. She also said she disagreed with Justice Owen on parental bypass. But she emphasized that Justice Owen's judicial approach to these cases was thoughtful and rational. She said it was easily within the respectable judicial mainstream on interpreting legislation. Sheep ended by saying she strongly supports the confirmation of Priscilla Owen.

Finally, I want to talk about the intent of the Texas legislature. I served in that legislature for two terms years ago. I know most of the members of the Texas house and

Senate. It is interesting to me that opponents of Justice Owen accuse her of misreading legislative intent by requiring more parental involvement than the legislators intended. I believe the opposite might well be true. In fact, the legislature is currently in the process of discussing a new law that would strengthen parental involvement and require parental consent, not parental notification. That bill has passed the Texas house and the Texas Senate. It is now in a conference committee.

Justice Owen is highly respected in Texas. Allow me to quote from a letter sent by Senator Florence Shapiro who was the chief sponsor of the parental notification act approved by the legislature in 1999. She says, "As a senator and a Texas legislator, the manner in which the Texas courts review and interpret our laws is extremely important to me. Justice Owen's opinions consistently demonstrate that she faithfully interprets the law as it is written and as the legislature intended, not based on her subjective idea of what the law should be."

I am saddened to see that partisan opponents of justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth. Her opinions interpreting the Texas parental notification act serve as prime examples of her judicial restraint. I appreciated that justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the governing U.S. Supreme Court precedent upon which language of the statute was based to determine what the legislature intended the act to do.

I, along with many of my colleagues, Democrats and Republicans alike, filed a bipartisan amicus curiae brief with the Supreme Court explaining that the language of the act was crafted in order to promote, except in very limited circumstances, parental involvement. Prior to the passage of the act a child could go to the doctor and have an extremely invasive procedure without even notifying one of her parents. At the same time school nurses were not even permitted to give aspirin to a child without parental consent.

Like legislators in dozens of states across America, we realized that something needed to be done to respect the role of parents that at least one parent should be involved in a major medical decision impacting their minor daughter. Because this was not an abortion bill but a parental involvement bill supported by lawmakers on both sides of the abortion debate, we were able to pass a bipartisan bill that promotes the relationship between parents and their minor daughters, and it is exceedingly popular with the people of Texas.

Justice Owen is the kind of judge that the people of the fifth circuit need on the bench as an experienced jurist who follows the law and uses common sense. I strongly urge the committee to reject the politics of personal destruction pushed by Justice Owen's extremist critics and vote positively on her nomination. She merits immediate confirmation. That is a letter from State Senator Florence Shapiro.

Mr. President, let's be clear about what is going on here. A number of interest groups fought against legislative enactment of the parental notification law. They lost. Now they are trying to undercut a judge who as honestly and fairly as she could

attempted to interpret that law. They are entitled to their opinion. They should vote their convictions. Priscilla Owen deserves an up-or-down vote on her nomination to the fifth circuit.

Mr. President, I want to respond to the distinguished Democratic leader who this morning said that Owen and ten other nominees have all received votes in the United States Senate. Senator Reid left out one important detail, and that is that if she had gotten a vote that would count as the confirmation vote, Justice Owen would be sitting on the fifth circuit today. Because indeed, this Senate has voted four times and four times has given her more than a majority which has always been the standard for confirmation in the United States Senate until the congress of two years ago. She has been confirmed by the United States Senate. Senator Reid is correct. But because the Democrats would not allow the vote to proceed and are requiring a 60-vote threshold, Justice Owen is back again on a nomination that has been pending for four years.

The Senate Republicans have asked the minority to allow the Senate to vote, but they have refused and continue to vote "no" on cloture. Thereby changing the constitution without going through the process of a constitutional amendment. When the constitution requires a supermajority is required, it is stated in the constitution. And for over 200 years this body has recognized that and has made a majority vote the standard, until the last session of the Senate.

Mr. President, it is disingenuous to even indicate that these ten nominees have had a vote because if they had had a vote and they had received the majority, they would be sitting on the benches for which they are nominated. But instead, Priscilla Owen, after being confirmed by the Senate four times, is back again. And Mr. President, I think we can do better. I think we can acknowledge the constitution and acknowledge that if we are going to amend the constitution that the United States Senate should start the process after a constitutional amendment. Because today the constitution, in every way, indicates that a majority vote is required and that has been the standard for over 200 years in the United States Senate until the last session of congress.

I hope Priscilla Owen will get the up-or-down vote because if she does, then we will know that the Democrats are going to keep the traditions of the Senate and keep the interpretation of the constitution that we have had in this country for over 200 years and if they want to change it, perhaps they should go about it in the right way and that is introduce a constitutional amendment to require a supermajority for confirmation of judges.

Mr. President, I think the founding fathers were geniuses. I that I the founding fathers knew that the balance of powers had to be very delicate between the three branches of government. And the balance of powers between the president's right to appoint circuit court judges and the Senate's right to deny that appointment by a majority vote or confirm by a majority vote is part of the balance of powers that has kept our country strong through ups and downs and challenges. The constitution has been the anchor for our democracy.

And Mr. President, I hope that Priscilla Owen will get an up-or-down vote and if she does, she is going to be confirmed because this Senate has given her a majority vote four times. It's just that we have not been able to proceed on the vote that counts. We were stopped on a procedural motion. A majority of the Senate voted to go forward on that motion, but it was a 60-vote threshold for a cloture vote. So we have a wonderful human being who has been demonized for four years and she has shown judicial temperament in every way by never responding, by showing no bitterness, no anger, but she is a human being and she is a good person. She deserves an up-or-down vote, and when she gets an up-or-down vote, Mr. President, Priscilla Owen will be a member of the fifth circuit court of appeals.

Mr. President, the Senate, I hope, is on the brink of doing the right thing by these nominees by acting like the lofty body that we are, can be, and should be. I hope that we will treat everyone who comes before us with respect, and I do not think that has been the case for this very fine Supreme Court justice for the state of Texas. I hope that is going to change. I hope that we will treat her as she should be treated. I hope that shell get her—she will get her up-or-down vote which will show that her four years of patience have allowed us to do the right thing and shell we able—she will be able to serve our country in a way that I know she will make all of us proud.

Thank you, Mr. President. I yield the floor.

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Statement by Senator Ted Stevens
Press Conference
May 19, 2005

I commend Senator Frist for his leadership on this judicial filibuster issue and his work to get the senate back to the way I have known it for my 36 years here – in fact, the way it has operated for 214 years.

It is my firm belief that filibusters do not belong in executive session.

The senate has the unquestioned power to define its procedures (through rules, precedents, etc.) By majority vote. The power comes straight from the constitution.

I know because I've seen it done. More importantly, I've seen the Senate repeatedly accept the legitimacy of changing the rules by majority vote.

In 1979, I was the minority whip of the senate. Seeking post-cloture and other rules changes, Senator Byrd threatened to exercise the constitutional option. He introduced s. Res. 9 on the opening day of the 96th congress, January 15, 1979, and used the constitutional option threat to leverage a time agreement, which he got on February 7, 1979.

Senator Byrd expressly threatened to use the constitutional option and actually offered a motion to that effect. He stated, "So, I say to senators again that the time

has come to change the rules. I want to change them in an orderly fashion. I want a time agreement. But, barring that, if I have to be forced into a corner to try for a majority vote I will do it because I am going to do my duty as I see my duty…"

Having threatened use of the constitutional option to secure a time agreement, Senator Byrd offered a motion to execute the option: he stated, "I send to the desk a privileged resolution to amend the standing rules of the senate, and I move pursuant to article I, section 5 of the constitution, the senate proceed to its immediate consideration without debate of the motion."

Senator Baker appointed me to lead a task force to craft a republican response. Senators Hatfield, Javits, McClure and helms were also part of the task force.

The agreement provided that the post-cloture rules change provisions of s. Res. 9 would be split out for separate treatment, but if they were not agreed to by 6 pm on February 22, 1979, then the senate would proceed to consider s. Res. 9 as a whole.

Each day of session from January 15 to February 22, Senator Byrd recessed the Senate, in order to continue legislative day January 15. This kept the constitutional option looming over the senate, because Senator Byrd could say that he was making a rules change at the beginning of congress (first legislative day).

The post-cloture provisions were broken out as S. Res. 61. They were considered for debate and amendment over four days. The resolution was agreed to on February 22, and per an understanding with senator baker, Senator Byrd put s. Res. 9 on the calendar and adjourned the senate, ending the threat of the constitutional option.

As a member of the minority at the time, and as one of the chief negotiators in this issue, I knew very clearly that if we did not compromise with Senator Byrd and the majority, he would institute the constitutional option.

At no time did republicans threaten to shut down the senate or engage in dilatory tactics. We never challenged the legitimacy of the constitutional option or accused Senator Byrd of "destroying" the Senate. We worked it out. But in the end, Senator Byrd got his way. The rules were changed because of Senator Byrd's threat – this was a change of our rules.

It saddens me to see the senate in this current predicament. The senate has been able before to avoid this situation because the minority recognized the bare fact that the constitution provides for majority decisions.

I may not have always agreed with a judicial nominee pick – <u>but I have never voted against cloture on a judicial nomination</u> allowing for an up-or-down vote on the Senate floor. These nominees deserve a vote. If a Senator doesn't agree with the nominee's qualifications, that senator should vote no. I have in the past and I will again if I disapprove with the nominee.

The other senators here may wish to comment – Senators Domenici, Grassley, Burns and Cochran.

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